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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-5478

ISAIAS LARA,

Petitioner

V.

STATE OF TEXAS,

Respondent

BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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TO THE SUPREME COURT OF THE UNITED STATES:

Now comes the State of Texas, Respondent, and files its response to Petitioner's petition for Writ of Certiorari.

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas were delivered on March 17, 1971 and May 1, 1971, and are reported at 465 S.W.2d 164 (Tex. Crim. —— 1971.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C., Section 1257(3). The jurisdictional requisites would appear to be adequately set forth in

the petition although Respondent disputes Petitioner's contentions that any rights quaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Respondent feels that the questions presented in Petitioner's petition for Writ of Certiorari can be condensed into one primary question and stated as follows:

> I. Was the warrantless arrest and search of Petitioner unreasonable under the Fourth and Fourteenth amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that the state proceedings in this case violated his Fourth Amendment rights against unreasonable search and seizure made applicable to the states by the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondent in stating its view of the case will cite the record on file in the Texas Court of Criminal Appeals as (R) and the Transcript of the Record in the State Trial Court below as (S.F.)

Petitioner was convicted in the 175th Judicial District Court of Bexar County, Texas in cause no. 69-257, styled the *State of Texas v. Isaias Lara*, on the fifth day of November, 1969, for the offense of the possession of heroin in violation of Article 725(b), Vernons Penal Code. The punishment assessed Petitioner by the jury was life imprisonment, the maximum sentence provided by Statute. (R 370,381)

The record on file in the Texas Court of Criminal Appeals reflects the following facts and circumstances

surrounding the arrest and search of Petitioner on November 4, 1968 by officers of the San Antonio Police Department in the city of San Antonio, Bexar County, Texas.

At approximately 4:30 p.m. Officer P. R. Gonzales, a Detective with eleven years of experience was patroling in the vicinity of the five hundred block of Matamoros Street, a location of vacant shacks known to be frequented by dope addicts, when he observed a parked car with the motor running. No one was near the car. Officer Gonzales then noticed a suspicious person who didn't live or belong there coming from this area of vacant shacks which he described as vacant rows of houses, one room type, uninhabitable and generally run-down. Officer Gonzales stopped this person, asked him for his identification and reason for being there, and failing to obtain responsive answers to these questions, released him because he had noticed another suspicious person, believed to be a lookout, standing by some of the vacant shacks just one hundred feet north of where he was standing in the street. Officers Gonzales returned to his patrol car and radioed for help, stating he suspected narcotic activity at this location. (R. 49, 154, 155, 165, 167, 168, S.F. 93, 94, 104, 106, 107)

Officer Gonzales testified that Officer Johnny Teran arrived about five minutes later and they started walking towards the shacks on Matamoros Street. There was one subject, the lookout, that they could see and they started getting over there real fast, running or walking, when this man yelled something, threw something, and started running. As soon as they got to the shack there were about five or six persons running in different directions. Officer Gonzales further testified that one of the subjects who ran was Isaias Lara; that he has known Isaias Lara for several years and on No-

vember 4, 1968 he saw Isaisa Lara running from this vacant shack. Upon seeing the flight of this person, Officer Gonzales ran after two subjects who ran north. Officer Teran ran after the others who ran east from the vacant shack. Officer Gonzales did not personally chase the Petitioner, but Officer Teran did. Officer Gonzales apprehended one of the men he was chasing about one block away. After Officer Gonzales arrested his quarry, they walked back to the corner of Monterrey and Leona and found Isaias Lara handcuffed to a stop sign. Officer Teran was just coming back with another subject. All three subjects were handcuffed and placed in the back of a patrol car and conveyed to the five hundred block of Matamoros Street, the starting point of the chase. The police wagon was called for. The three subjects were taken out of the car, and all were given "miranda" warnings. (R 49, 50, 156, 157, 158, 182, S.F. 95, 96, 97, 121).

Officer Gonzales stated that as a police officer, he had experience observing persons under the influence of narcotics. Based upon his knowledge, observation and experience, it was his opinion on seeing Isaias Lara at the time he was handcuffed to the stop sign, and later after he was removed from the vehicle, that Isaias Lara was under the influence of narcotics. Isaias Lara's appearance was described by Officer Gonzales as being kind of like he was asleep, his eyes were falling down, like in a daze, his mouth remained open like he was going to sleep. Officer Gonzales therefore conducted a search, starting from Lara's socks and proceeding to Lara's waist and packets. The front pockets were turned inside out and upon doing so a capsule of heroin fell out on the sidewalk. Officer Gonzales picked the capsule up and showed it to Officer Teran who was right there with him. Isaias Lara was then

placed in the police wagon and subsequently booked for possession of heroin. Officer Gonzales further testified that upon a check of the premises he found evidence of narcotic activity in the shack from which Isaias Lara had run. (R 55, 160, 161, 162, S.F. 99, 100, 101)

Officer Johnny Teran testified that he was dispatched to the scene because of suspected narcotic activity and that he met Officer Gonzales and that as they started walking toward the house a "lookout" yelled something and about five or six subjects ran from one of the abandoned houses. Officer Teran gave chase, caught Isaias Lara, and handcuffed him to a stop sign. Officer Teran quickly searched him, found a pocket knife, then ran to apprehend the others. After Gonzales and Teran returned with the other subjects Isaias Lara was read a legal warning and searched. Heroin was found on Isaias Lara.

Officer Teran also testified that based upon his knowledge, observation and experience, it was his opinion and impression upon seeing Isaias Lara at the time he caught him and before he handcuffed him to the stop sign and later after he was removed from the stop sign that Isaias Lara was under the influence of narcotics. Officer Teran described Isaias Lara's appearance as being real droopy. His mouth was droopy and drooling at both sides and he was wobbling around a lot and could hardly keep his eyes open. (R 38, 39, 40, 43, 44, 204, 205, 206, 207, S. F. 142, 143, 144, 146)

Officer Teran further testified in regard to the location from which Isaias Lara had run that his suspicions were aroused, "like I said we have made calls here before. We had received information from other people, reliable people, that they had seen a lot of sub-

jects, dope addicts, going to that location and into the shacks and where they had gone in there and used dope; and on previous occasions, I have gone there and we have arrested — I have arrested other subjects from this location. And while I have looked through the shacks I have seen all the evidence of the use of heroin. I have seen burnt bottle caps. I have found empty boxes of those gelatine capsules, the boxes and the empty capsules and soda water bottles with water. On occasions I have found old needles; all indications that they are using this location." (R 45, 218, 219, S.F. 156, 157)

Based on the above particular facts and circumstances surrounding Petitioner's arrest and search, the Trial Court overruled Petitioner's Motion to Suppress Evidence and objections to the introduction of said evidence at his trial, and upon appeal, the Court of Criminal Appeals of Texas rejected Petitioner's Points of Error and affirmed the Trial Court ruling.

ARGUMENT AND AUTHORITIES

I. Was the warrantless arrest and search of Petitioner unreasonable under the Fourth and Fourteenth amendments to the United States Constitution?

The Fourth Amendment recognizes that the individual's right of privacy must at times give way to the needs of society and prohibits only "unreasonable" searches and seizures, not all searches and seizures. *Elkins v. United States* 364 U.S. 206, (1960). Therefore the ultimate test is whether under all the circumstances of the on the street encounter, Petitioner's right to personal security was violated by the search and seizure. *Terry v. Ohio* 392 U.S. 1, 9, (1968).

With the exception of "stop and frisk" situations, *Terry v. Ohio* supra., probable cause is necessary to

justify any search whether or not conducted under the authority of a warrant. The Courts have generally found probable cause for a search where there is a reasonable ground for suspicion, supported by facts and circumstances sufficiently strong in themselves to lead a reasonably cautious man to believe that a person is guilty of a particular crime, and to believe that the place to be searched contains evidence of that crime. The Courts have considered this test as a non-technical standard to be judged in the light of everyday experience, and not as an abstract legal formulation; moreover, the test is not whether the facts would cause an ordinary citizen to believe an offense had been committed but whether they would cause such a belief in the mind of a reasonable law enforcement officer in light of his training and experience. Whether there is probable cause to justify a search or seizure must be decided on the basis of the individual facts of each situation.

English and American Law has always recognized the right on the part of the arresting officers "to search the person of the accused when legally arrested, to discover and seize the fruits as evidence of crime" *Weeks v. United States* 232 U.S., 283, 392, (1914); *United States v. Pardo-Bolland* 229 F. Supp. 473 (S.D.N.Y., 1964), affirmed 348 F.2d 316, (2nd Cir. 1965), cert denied 382 U.S. 944. In such cases, seizure is not restricted to things which might be taken under a search warrant, when there is no arrest of the possessor. In the words of Judge Cardozo, "The peace officer empowered to arrest must be empowered to disarm. If he may disarm he may search lest a weapon be concealed. The search being lawful, he retains what he finds, if connected with the crime." *People v. Chiagles* 237 N.Y. 193, 197-198, 142 N.E. 583 (1923).

All items taken from Petitioner's person incident to his lawful arrest may be retained by the State and used upon the trial insofar as relevant. *Draper v. United States* 358 U.S. 307, (1959); *Warden v. Hayden* 387 U.S. 294, (1967); *Chinel v. United States* 395 U.S. 752, (1969). Furthermore a search made incidental to arrest is not reasonable unless it is made contemporaneously with the arrest, that is not remote in time or place. *Price v. United States* 348 F.2d 68, (D.C. Cir. 1965) cert. denied, 352 U.S. 888.

The question in this court is not whether the search and seizure was authorized by state law; the question is rather whether the search was reasonable under the Fourth Amendment to the United States Constitution. *Sifron v. New York* 392 U.S. 40, 61, (1967). Petetioner does not attack the constitutionality of Article 14.03, Vernons Code of Criminal Procedure.[1] Respondent disputes Petitioner's characterization of Article 14.03, Vernons Code of Criminal Procedure as nothing more than the Texas "stop and frisk" law. The provision clearly authorizes a lawful arrest without a warrant, and search incident to the arrest, based upon circumstantial facts as contrasted with Article 14.01, Vernons Code of Criminal Procedure, which authorizes an arrest without a warrant when the offense is committed in the officer's presence or within his view.[2]

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[1]Article 14.03, V.C.C.P., provides:

"Any peace officer may arrest, without warrant, persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."

[2]Article 14.01, V.C.C.P., provides:

"(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in

Baity v. State, 455 S.W.2d 305, (Tex. Crim. 1970).

The Texas Court of Criminal Appeals recently recognized in *Baity v. State* supra, that circumstances short of probable cause for an arrest may justify temporary detention for investigation and questioning as recognized in *Terry v. Ohio*, supra. If a stop and frisk gives rise to probable cause to believe that the suspect has committed a crime, or is presently committing a crime in view of the officer, Texas law empowers the officer to make a formal arrest without a warrant and a full incident search of the person. Art. 14.03, 14.01, V.C.C.P., supra.

The situation presented by the facts and circumstances set forward in Respondent's Statement of the Case is clearly the classic situation of an on the street encounter, necessitating the swift action on the part of the officer, which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. The officer's conduct in this case, as in *Terry v. Ohio,* supra., must be tested by the Fourth Amendment's general proscription against unreasonable search and seizure.

The officers, Gonzales and Teran, were experienced and well trained police officers; both had previous knowledge of a particular area of old vacant shacks being used as a "shooting gallery." They had reliable complaints from citizens living in the neighborhood that unlawful activities were occurring at this location. Officer Gonzales noticed two suspicious persons near the area and a car unattended with its motor running.

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his presence or within his view, if the offense is one classed as a felony or an offense against the public peace.

"(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view."

Upon inquiry of one of the suspicious persons, Officer Gonzales was unable to obtain responsive answers to his questions but because he observed the other person standing near the vacant shacks he chose to let the first man go and to request the help of another officer specifically stating that he suspected narcotic activity. The other person, suspicioned to be a lookout, in fact turned out to be a lookcut, and after he warned the occupants of one of the shacks, five or six persons were subsequently seen running from the shack. Isaias Lara was recognized by both officers as having run out of one of the shacks. Officer Teran apprehended and arrested Petitioner within a block of Matamoros Street and testified that prior to handcuffing Petitioner to a stop sign and conducting a search for weapons he observed that Petitioner appeared to be under the influence of narcotics because of his droopy mouth, eyes, and physical exhaustion. Officer Gonzales, prior to the second search, observed Petitioner's appearance and testified that in his opinion Petitioner was under the influence of narcotics, a felony offense in Texas under Article 725(c) V.P.C. A search of the premises from which Petitioner fled revealed further evidence of narcotic activity. As stated in the Peters' case, 392 U.S. 40, 66, (1904), and equally applicable to the facts presented above, "it is difficult to conceive of stronger grounds for an arrest short of actual eye-witness observation of criminal activity."

It is therefore Respondent's position that when Officer Teran handcuffed Petitioner to the stop sign he had probable cause to believe that Petitioner was engaged in criminal activities, that at this point, he had the authority to search Petitioner, and the incident search was obviously justified by the need to seize weapons which might be used to assault the officer or

effect an escape, as well as by the need to prevent the destruction of evidence of the crim . *Preston v. United States* 376 U.S. 364, 367, (1964). As pointed out by the Texas Court of Criminal Appeals in its opinion on Appellant's Motion for Rehearing,

> "Officer Teran was unable, under the circumstances to make more than a cursory search when the Appellant was first apprehended, unless he had been willing to allow the other subjects to flee unapprehended. The second search was within a short distance and within a short time after the arrest and was substantially contemporaneous therewith. In our opinion the arrest, the limited search, the return of the Appellant to the scene from which he fled, the warnings and subsequent search were all a part of one continuous happening. Cf. *Taylor v. State*, 421 S.W.2d 403, 408, cert. den. 393 U.S. 916, 89 S.Ct. 241, 11 L.Ed. 2d 201."

The Court of Criminal Appeals went on to hold that:

> the officers made a bona fide arrest of the Appellant under the provisions of Article 14.03, V.A.C.C.P.[1] Thereupon they discovered he was under the influence of a narcotic drug, a felony. See Article 725(c), V.A.P.C. Under such circumstances Article 14.01, V.A.C.C.P.[2] would come into play authorizing Appellant's arrest for that offense and authorizing a search incident to that arrest. The subsequent search would not necessarily be tied to Article 14.03, supra., but rather to the violation later discovered. See *Taylor v. State*, supra., at p. 407; *Gutierrez v. State*, 422 S.W.2d 467; *Denham v. State*, 428 S.W. 2d 814. Thus another reason appears to justify the second or subsequent search."

Accordingly, under the above authorities and argument the seizure of heroin from Petitioner should be upheld as a product of a legal arrest without warrant and a reasonable search incident to a lawful arrest.

CONCLUSION

In light of the foregoing circumstances and for the reasons advanced above, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert C. Flowers, Assistant Attorney General of Texas, Attorney for Respondent, certify that a copy of the foregoing Respondent's Brief and Opposition has been served on Petitioner by placing same in the United States Mail, postage prepaid to Petitioner's Attorney, Mr. Harry A. Nash, Jr., 1925 Tower Life Building, San Antonio, Texas 78205, Mr. Theo P. Henly, 1203 Tower Life Building, San Antonio, Texas 78205 this the _____ day of November, 1971.

Assistant Attorney General